Filed 8/24/04 P. v. Byrd CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES GARY BYRD, Defendant and Appellant.	B169811 (Los Angeles County Super. Ct. No. BA244467)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, William T. Harter and Kenneth N. Sokoler, Deputy Attorneys General, for Plaintiff and Respondent.

James Gary Byrd appeals from a judgment entered upon his conviction by jury of voluntary manslaughter (Pen. Code, § 192, subd. (a)).[1] The jury found that in the commission of the offense appellant used a deadly weapon within the meaning of section 12022, subdivision (b)(1). The trial court found that appellant had suffered three prior felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i) and 667, subdivision (a) and six prior prison terms within the meaning of section 667.5, subdivision (b). It sentenced appellant to an aggregate prison term of 41 years to life. Appellant contends that (1) there was insufficient evidence to support his conviction of voluntary manslaughter, and (2) the trial court prejudicially erred in instructing the jury on voluntary manslaughter.

We affirm.

FACTUAL BACKGROUND

The prosecution's case.

We review the evidence under the usual rules on appeal. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) In May 2002, Appellant had been Latanya Benjamin's boyfriend for approximately seven years. On May 28, 2002, at 9:44 a.m., he telephoned 911 and requested that a police car be sent to 1868 Nadeau Street, in the County of Los Angeles. The 911 conversation went, in part, as follows: "[APPELLANT]: I need police assistance . . . [¶] [OPERATOR]: What is the emergency? [¶] [APPELLANT]: Homicide. Murder. [¶] [OPERATOR]: Like what kind, what happened? [¶] [APPELLANT]: I don't know what happened. I just did something. . . . [¶] . . . [¶] [APPELLANT]: I'm trying to come . . . I'm trying to do the right thing, and you are asking me all these questions."

At 10:05 a.m., appellant again telephoned 911 and asked for the police to be dispatched. He told the operator that he thought he "really hurt somebody . . . really bad

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

. . . ” He reiterated that he was trying to do the right thing and said that he thought he stabbed his girlfriend and killed her, but was uncertain.

Los Angeles County Deputy Sheriff Eric Cheatham and his partner, Deputy Davis, were dispatched to the location. There, appellant flagged them down and said, “‘Take me to jail, I killed my girlfriend.’” He was placed in the police vehicle where he stated in a recorded conversation, “I was fucking drunk out of my fucking mind. She tried to stop me in front of the house and fuck with me -- she came at me with a knife man and I took it from her and I think I cut her throat with it.” When the deputies questioned him further about his belief that he took the knife from Benjamin, appellant stated, “Man I don’t -- look man. She came at me with a knife and I blanked out.” Appellant told the deputies he had been using ecstasy, cocaine and drinking heavily. He begged the police to take him to jail, fearing Benjamin’s family members, whom appellant believed were involved in the Pueblo Bloods gang, would retaliate against him.

Between 11:00 a.m. and noon, appellant was transported to the sheriff’s station where Detective Steven Sena and his partner, Detective Jesse Linn, interviewed him, part of which interview was audio-recorded. In the unrecorded portion of the interview, appellant reported that he drank a 40-ounce bottle of beer, smoked cocaine, and took a pill he thought was ecstasy. He also said that Benjamin attacked him with a knife, which he took from her. In the tape-recorded portion of the interview, he stated that he was on the porch, ingested drugs, blanked out and went into the house, but after that, he could not “picture it . . .” He said he could not remember if he had an argument with Benjamin, or how he killed her. He did not know if he used a weapon or his hands, although he thought he choked her to death. Appellant said that he “committed the ultimate sin,” but did not know how he did it. Detective Sena did not recall observing any injuries on appellant or appellant saying that he was injured. Appellant requested that they take blood from him because he thought a pill that he took was ecstasy, but was unsure and wanted to find out. His blood was drawn and booked in evidence. Appellant did not appear to be under the influence of narcotics or alcohol at the time of the interview.

Deputy Steven Marella and his partner, Deputy John Sanchez, were dispatched to Benjamin's residence where they found her lying on the bedroom floor with her upper body and face covered with a blanket. She had a large laceration across her throat and appeared to be dead. A knife was on the floor next to her left hand. Although he was not paying particular attention to the condition of the bedroom, Deputy Marella did not notice any items such as perfume bottles on the floor.

At approximately 10:00 a.m., Detective Kelle Baitx, the officer supervising the investigation, arrived at the murder scene and saw no sign of forced entry at Benjamin's door. The apartment was neat, clean and orderly. In the living room, where a deputy had climbed through a window to enter, the television had been pushed askew and some figurines had fallen off of the shelves and were lying shattered on the floor. In the bedroom, a chair was on the bed, slippers and undergarments were on the floor and the front of a bottom drawer of an end table looked askew, but otherwise everything in the bedroom seemed to be in place. There were no blood swipe marks on the walls. Detective Baitx specifically recalled that there was nothing on the floor that had appeared to come off of the dresser. He testified: "In this case, I felt, in looking at the crime scene, the victim in fact did not struggle after her throat was cut. I would not expect any swipe marks to be caused by the victim." He noticed a wood block containing a set of steak knives which still had plastic packaging on it. One of the knives was missing, and the set of knives appeared to match the knife found near Benjamin's body. He found no drug paraphernalia in the apartment.

In Detective Baitx's experience, most knife attacks involve a violent struggle and leave signs of a struggle, such as small items knocked over or displaced and blood splatter and swipe marks on the walls or furniture. He opined that there was no evidence of a struggle, although the chair on the bed, undergarments on the floor and drawers askew "could relate to a possible struggle." It appeared Benjamin went straight to the ground when her throat was cut. The detective also opined that when a killer knows the

victim and covers the face, it is usually because the killer was remorseful and spent some time at the scene after the killing.

Los Angeles County Deputy Medical Examiner, Juan Carrillo, determined that Benjamin died of a single cut wound to her throat by a sharp instrument and believed the time of death was approximately 10 to 12 hours before police found her. The knife found near her body could have caused the wound. She also had a defensive wound on one of her fingers, apparently suffered while trying to stop the knife. There were no other cuts or abrasions to indicate a struggle and no hemorrhage in her eye to indicate she had been choked. She tested negative for drugs and alcohol. Carrillo opined that the murderer was likely standing behind Benjamin when he cut her throat. Once cut, Benjamin would have been immediately disabled and fallen to the floor.

Benjamin had had a drug problem from 1988 to 1997, but had been sober for the last few years before her death. She never said a bad word about her relationship with appellant to her sister, and her sister had never seen appellant or Benjamin use physical force against the other. They appeared to get along. Benjamin's sister did not believe Benjamin was an aggressive person, although as a teenager, she had seen her sister in two physical altercations with other girls, but never with a weapon.

Appellant's blood sample tested positive for cocaine but negative for methamphetamine and ecstasy.

The defense's case.

Nick Sanchez, a police criminalist, testified that an analysis of scrapings from Benjamin's fingernails showed the presence of appellant's DNA, but that he could not tell when the DNA got her nails. He testified that it required more than casual contact to transfer DNA to another person's fingernails. It would have required that Benjamin's finger either have been in some of appellant's body fluid or scratched him hard enough to draw blood, as scratching skin cells without drawing blood would not transfer DNA. Washing hands would eventually remove the DNA.

Appellant's mother, Rosa Lars, his sister, Laquina Garner, and Garner's daughter, Cor'nisha Trammell all testified as to Benjamin's aggressive nature. All were very close with Benjamin, and Lars testified that she and Benjamin loved each other. Benjamin was described as a jealous person who had violently attacked Tamarie Robinson, a former girlfriend of appellant, when Robinson was pregnant, hitting and kicking her. Lars even saw Benjamin once fight, and beat up, three young women.

Benjamin's aggressiveness was directed toward appellant on numerous occasions. On one occasion, Lars saw her stab appellant in the back with a fork and, on another occasion, with a knife. She saw Benjamin grab a knife during arguments, once grabbing a box cutter and another time chasing appellant down the stairs with a knife in each hand, telling him, "'Don't make me kill you.'" Lars testified: ". . . [E]very time [Benjamin] would get mad, she would run and grab some kind of a -- a knife or something." Garner testified that on her birthday on May 1, 2002, feeling ignored when she tried to talk to appellant, Benjamin went home and returned with a steak knife and told appellant, "'I'll cut you,'" and "'I'll kill you.'" Trammell testified that during the birthday incident, Benjamin pulled two knives on appellant and tried to cut him. Garner took the knives from her. Trammell had heard Benjamin complain that appellant would not hit her, and would never hit a woman.

Deputy John Sanchez went with his partner, Deputy Marella to Benjamin's apartment. He testified that the apartment "was in good shape." In the bedroom, Benjamin was covered by a blanket. Detective Sanchez recalled that a drawer in the nightstand was open and "shoes and things" were on the floor "but not much else." At the preliminary hearing, however, he testified that the bedroom had a different appearance than the rest of the apartment, as some clothes and bottles of perfume or lotion were on the bedroom floor, and it appeared things had been thrown around like someone had been wrestling or fighting there.

DISCUSSION

I. The evidence was sufficient to support appellant's conviction of voluntary manslaughter.

Appellant was charged with murder. The jury was instructed on first and second degree murder and on the lesser-included offenses of voluntary manslaughter and involuntary manslaughter, based on unconsciousness induced by consumption of drugs and alcohol. The jury found appellant not guilty of first and second degree murder but guilty of voluntary manslaughter.

Appellant contends that there was insufficient evidence to sustain his conviction of voluntary manslaughter. He argues that his statements to police were a significant portion of the evidence and established that he acted in self-defense in that he killed Benjamin to prevent serious bodily injury to himself after she attacked him with a knife. He further argues that the prosecution introduced no conflicting evidence to establish that the killing was unlawful. This contention lacks merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin, supra,* at p. 331.) "The standard of review is the same in cases where the People, as here, rely primarily on circumstantial evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 346; see also *People v. Teale* (1969) 70 Cal.2d 497, 505.)

Appellant's contention is premised upon a fundamental misconception. He focuses on whether there was sufficient evidence to support his self-defense claim (which

the jury rejected), while under the above stated principles we must focus on whether there was sufficient evidence to support the jury's verdict. We conclude that there was.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) Malice should be implied """when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."" (*People v. Martinez* (2003) 31 Cal.4th 673, 684.)

Manslaughter is "'the unlawful killing of a human being without malice.'" (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense."" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) An intentional killing is reduced from murder to manslaughter "if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause '"an ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment."" (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any '"'violent, intense, high-wrought or enthusiastic emotion.'""" (*Ibid*.) A person who is provoked by sudden quarrel or heat of passion to kill lacks malice. A conviction of manslaughter based on heat of passion requires proof of (1) an objective element that there was sufficient provocation "to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment'"" (*ibid.*), and (2) a

subjective element that the defendant's reason was in fact overcome by an overwhelming passion. (*Ibid*.)

There was sufficient evidence here to support the voluntary manslaughter verdict on a heat of passion theory. Appellant and Benjamin were having an argument. She attacked him with a knife that he was able to wrest from her and use to fatally slash her throat. An attack with a deadly weapon may constitute provocation for a heat of passion defense. (See *People v. Elmore* (1914) 167 Cal. 205, 211 ["The blows given would naturally arouse a sudden passion. The law deems such provocation sufficient to support the theory of manslaughter."].) As stated by our Supreme Court in *People v. Chacon* (1968) 69 Cal.2d 765, 781: "In a prosecution for murder the presence of sufficient provocation or heat of passion negates the existence of the requisite malice aforethought. [Citation.] In the usual case, this instruction supplements the self-defense instruction. Thus, in a prosecution for murder, even though the defense of self-defense fails, as it might for excessive retaliation by the defendant, the jury might still find the original attack sufficient to constitute provocation, which would preclude a finding of malice aforethought and reduce the crime to manslaughter."

People v. Castro (1940) 37 Cal.App.2d 311 presents facts similar to those presented here. There, a wife attacked her husband with a knife. She dropped the knife which he picked up and slashed at her, causing her death. The Court of Appeal concluded that those facts mandated instruction on sudden quarrel or heat of passion. (*Id.* at p. 315.)

Here, the jury found that appellant did not act in self-defense. As in *People v. Chacon*, it may likely have reached that conclusion because it believed that appellant's actions were excessive, for once he took the knife from Benjamin, he did not need to kill her to protect himself. Alternatively, the jury may simply have disregarded appellant's testimony, believing that he was incredible as he gave conflicting stories to police and did not turn himself into the police until 10 or more hours after the killing. Moreover, appellant's statements to police did not clearly present a case of self-defense. He told

police in one statement that he did not recall if he had an argument with his girlfriend or what happened when he went inside the house. He never explained how he got the knife from her and why it was necessary to kill her after he had done so. The jury may have concluded that Benjamin's physical attack on appellant was sufficient provocation to justify a heat of passion defense.[2]

II. The trial court did not err in instructing the jury on voluntary manslaughter.

Over appellant's objection, the trial court instructed the jury on voluntary manslaughter as a lesser-included offense of the charged crime of murder. It explained to the jury that if it found that the killing took place in a sudden quarrel, in a heat of passion or the appellant acted in the unreasonable but good faith belief that he had to defend himself, it should find that there was no malice and that appellant was only guilty of voluntary manslaughter.[3]

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[2] Having concluded that there was sufficient evidence to support the verdict on a theory of sudden quarrel or heat of passion, we need not consider whether there was also sufficient evidence on an imperfect self-defense theory.

[3] The trial court instructed the jury on voluntary manslaughter in accordance with CALJIC No. 8.40, as follows: "Every person who unlawfully kills another human being [without malice aforethought but] either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] [There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].] [¶] 'Conscious disregard for life,' as used in this instruction means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human life was killed; [¶] 2. The killing was unlawful; and [¶] 3. The perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life; and [¶] 4. The perpetrator's conduct resulted in the unlawful killing. [A killing is unlawful, if it was [neither] [not] [justifiable] [nor] [excusable].]"

Appellant contends that the trial court erred in instructing the jury on voluntary manslaughter because it was inconsistent with the defense's theory of the case and was unsupported by substantial evidence. This contention is without merit.

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Breverman, supra,* 19 Cal.4th at p. 154 quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) This obligation has been held to include giving instructions sua sponte on lesser-included offenses when the evidence raises a question whether all of the elements of the charged offense were present (*People v. Breverman, supra,* at p. 154), but not when there is no evidence that the offense was less than charged.

The trial court is not obliged to instruct on theories that have no evidentiary support. (*Breverman, supra,* 19 Cal. 4th at p. 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Ibid.*) "'Substantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed." (*Ibid.*) In making this assessment, the court is not to assess the credibility of witnesses, a task for the jury. (*Ibid*.)

Contrary to appellant's assertion, unlike with traditional affirmative defenses, a trial court must instruct sua sponte on a lesser-included offense even if it is inconsistent with the defendant's theory of the case. (*People v. Breverman, supra,* 19 Cal.4th at p. 159 ["'[t]he trial court must instruct on lesser included offenses . . . [supported by the evidence] . . . , regardless of the theories of the case proffered by the parties.'"]; *People v. Elize* (1999) 71 Cal.App.4th 605, 615 ["[A] lesser included instruction is required even

though the factual premise underlying the instruction is contrary to the defendant's own testimony, so long as there is substantial evidence in the entire record to support that premise."]; see also *People v. Barton* (1995) 12 Cal.4th 186, 196.)

"[V]oluntary manslaughter, *whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion*, . . . it is a lesser offense included in the crime of murder." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 159.) The California Supreme Court held in *People v. Breverman*, "We therefore affirm that a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*Id.* at p. 162.) We therefore conclude that if there was substantial evidence to support a voluntary manslaughter conviction, the trial court did not err in instructing on that offense sua sponte over objection.

For the reasons discussed in Part I, *ante*, as there was sufficient evidence to support appellant's conviction for voluntary manslaughter, there was also sufficient evidence to require the trial court to instruct the jury sua sponte on that lesser included offense.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

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_____, J.

ASHMANN-GERST